St. Francis Hotel *and* Hotel and Restaurant Employees and Bartenders Union, Local 2 *and* Sin Yee Poon. Cases 20-CA-14621 and 20-CA-14912

March 29, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On January 13, 1981, Administrative Law Judge Michael D. Stevenson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The initial charge (Case 20-CA-14621) concerns allegations that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended, by depriving employees of their *Weingarten* rights[1] to union representation at investigatory interviews which the employees reasonably believed might result in disciplinary action. On July 24, 1979,[2] Respondent and the Union entered into a settlement agreement which was approved by the Regional Director for Region 20 on July 25. Subsequently, an additional charge (Case 20-CA-14912) was filed concerning allegations that Respondent further deprived employees of their *Weingarten* rights. Accordingly, the Regional Director withdrew approval of the settlement agreement and issued the consolidated complaint herein alleging both presettlement and post-settlement *Weingarten* violations.

The Board will not find an unfair labor practice based on the subject of a settlement agreement unless the settlement is first set aside, and the Board will not set aside a settlement agreement unless there is a breach of the agreement or a subsequent related violation of the Act. *Henry I. Siegel Co., Inc.*, 143 NLRB 386 (1963). The General Counsel contends that the settlement agreement should be set aside on the basis of the alleged subsequent violation of the Act. However, for the reasons set forth below, we find that the subsequent conduct did not violate the Act. Accordingly, we shall not set aside the settlement agreement, or find the violations alleged, but will dismiss the complaint in its entirety.

The only post-settlement violation alleged in the complaint concerns a memorandum from Respondent's general manager to division heads. The memorandum was dated August 13, 1979, was marked "Confidential," and concerned the "NLRB SETTLEMENT AGREEMENT - HOTEL ST. FRANCIS/LOCAL 2." The memorandum explains generally the settlement agreement and contains examples of how to handle situations which might arise, including the following which the General Counsel contends violates *Weingarten* principles:

> Mary Jane is asked to meet with her supervisor at the end of the shift to discuss the day's work. If Mary Jane feels she might be disciplined as a result of the meeting, she can request the presence of a union representative (shop steward) to be present and she must be given the opportunity to have one there. The role of the shop steward is to observe and assist Mary Jane in responding to questions, however, the shop steward may not speak for her.

There is no evidence that the memorandum was communicated to employees, and there is no evidence of any denial of *Weingarten* rights in any post-settlement interview. Instead, the General Counsel contends, and the Administrative Law Judge found, that the memorandum on its face violates the Act. We do not agree.

The Administrative Law Judge focused on the language stating "the shop steward may not speak for her" and found that it amounted to a flat prohibition of the steward's speaking out. If the Administrative Law Judge's reading of the language is correct, then the memorandum is evidence of a violation of the Act. See *Southwestern Bell Telephone Company*, 251 NLRB 612 (1980), enforcement denied 667 F.2d 470 (5th Cir. 1982), and *Texaco, Inc.*, 251 NLRB 633 (1980), enfd. 659 F.2d 124 (9th Cir. 1981), in which the Board held that an employee's *Weingarten* right includes both the presence and the participation of the union representative. On the other hand, the language could also be read to mean that a supervisor can insist on the employee's own account of the matter, which is clearly permissible. See *Weingarten, supra* at 602. Thus, we find that the particular language is not all that clear.

The Administrative Law Judge also looked at the following part of the memorandum:

[1] *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975).
[2] All dates refer to 1979.

> The NLRB settlement agreement should not alter your day-to-day supervision of your respective employees. It is "business as usual" and our practices with respect to "managing the work place" should not change because of that agreement.

The Administrative Law Judge found that the reference to "business as usual" told supervisors to continue doing what they had done before relative to the alleged presettlement *Weingarten* violations. We do not read the language that way. In the immediate context, "business as usual" refers to day-to-day supervision, not to *Weingarten* interviews. In the broader context, it refers to the limited role stewards have under the collective-bargaining agreement which provides, "Said shop stewards shall not interfere with the management of the business or substitute for the Business Agents of the Union in handling complaints." However, the memorandum specifically addresses this limitation in relation to *Weingarten* interviews and states that shop stewards are to be recognized as union representatives for such purpose but are not otherwise to be recognized as employee representatives in such matters as grievances and problem solving. The memorandum states, "The [settlement] agreement, with respect to the shop steward recognizes the shop steward as a union representative solely for the purpose of being present during [a *Weingarten*] interview . . . ." Thus, in context, "business as usual" refers to matters other than *Weingarten* interviews.[3]

Because the language, "the shop steward may not speak for her," suggests that Respondent was attempting to control what stewards can do in *Weingarten* interviews, the language is suspect. It is possible to interpret the memorandum to mean that Respondent was restricting the steward's role to that of an inactive participant or silent observer, but that is not the only possible interpretation. The best evidence of what Respondent meant would be the actions that were taken pursuant to the memorandum. If Respondent had restricted the steward's role to that of a silent observer, it would have violated the Act. As indicated, however, there is no evidence of any such post-settlement action or, indeed, of any post-settlement *Weingarten* interview.[4]

From the foregoing, we find that the memorandum does not clearly show an intent to violate employee *Weingarten* rights. The meaning of the memorandum is not clear and is at worst ambiguous.[5] In appropriate circumstances an ambiguous policy or rule which could reasonably be interpreted as violative of employee rights will be construed against the maker of the policy or rule and, even if it was not followed, will be found to have violated the Act. For example, an ambiguous no-solicitation rule violates the Act even if there is no evidence that the rule was enforced against employees. *Mallory Battery Company, a division of P. R. Mallory & Co., Inc.*, 239 NLRB 204 (1978). The appropriate circumstances, however, are not present here. The reason we construe an ambiguous rule or policy against the maker is that employees could be misled by the ambiguity and thereby could be inhibited in the exercise of their statutory rights. The standard to be applied is an objective standard, not a subjective one; we ask whether the rule or policy *could* mislead employees, not whether the rule *did* mislead them. In the instant case, unlike *Mallory* where the ambiguous rule was stated in a pamphlet given to employees, there is no evidence that the ambiguous policy in the memorandum was communicated to employees or that employees were aware of the memorandum. The memorandum was circulated to supervisory department heads and was not intended to be read by or communicated to employees. So far as the record shows, the only *Weingarten* policy communicated to employees after the settlement was the "Notice To Employees" posted pursuant to the settlement, which reads in pertinent part:

> WE WILL NOT require any employee to submit to an interview with our representatives which he or she reasonably fears might result in discipline, while denying his or her request for union representation during the interview.
>
> WE WILL NOT refuse to recognize shop stewards as Union representatives for the purpose of Union representation in such potential

[3] The presettlement complaint allegations apparently concern Respondent's attempt to apply the contractual restrictions on steward activity to *Weingarten* interviews as well as to other matters. In agreeing to the settlement Respondent abandoned this position. The memorandum in stating that during *Weingarten* interviews employees are to be allowed to have stewards present to assist them indicates that Respondent was telling its supervisors that "business as usual" did not apply to such interviews.

[4] There is no evidence that Respondent ever had such a policy. Although one presettlement allegation involved the refusal to permit a steward to speak, the steward merely happened to be present when the interview began and refused to leave. Respondent based its refusal on its policy at the time of not permitting stewards to represent employees in any manner, including being present at *Weingarten* interviews. However, as previously indicated, the settlement and the internal memorandum both show Respondent's intent to abandon its prior position and to permit stewards to represent employees for, but only for, *Weingarten* interviews. Thus, again, "business as usual" does not refer to *Weingarten* interviews or to any restriction on the role of stewards in such interviews.

[5] Accordingly, we need not decide whether an internal memorandum or instruction showing an unlawful intent violates the Act without any showing of employee knowledge or employer implementation. See, generally, *Elm Hill Meats of Owensboro, Inc.*, 205 NLRB 285 (1973).

disciplinary interviews. However, this is not to be construed as superseding the rights of the parties in respect to the grievance handling provisions of the collective bargaining agreement.

On this record, the General Counsel has failed to show that employees were aware of the ambiguous memorandum and, thus, has failed to show that employees could have been misled by that memorandum to forgo their *Weingarten* rights. Accordingly, we find that the General Counsel has failed to meet his burden of proof and that there is, therefore, no basis on this record to construe the ambiguity against Respondent.

As we have found that the memorandum is at worst ambiguous and that there is no basis to find that employees objectively could have been adversely influenced or affected by the ambiguity, we find that the memorandum does not violate the Act as alleged. As the General Counsel has failed to prove that Respondent has engaged in any post-settlement unfair labor practice, the settlement agreement will be reinstated. Accordingly, we find it unnecessary to consider the alleged presettlement unfair labor practices and shall dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the consolidated complaint herein be, and it hereby is, dismissed in its entirety.

IT IS FURTHER ORDERED that the settlement agreement entered into between Respondent and the Union on July 24, 1979, be, and it hereby is, reinstated.

MEMBER JENKINS, dissenting:

Contrary to my colleagues, I agree with the Administrative Law Judge's finding that Respondent's post-settlement memorandum to its supervisors violated Section 8(a)(1) of the Act, and that such conduct presented a proper foundation to vacate the settlement agreement.

The facts of this matter are essentially undisputed and correctly set forth by my colleagues. However, unlike them, I am unwilling to don blinders in making findings and conclusions from those facts. It is uncontroverted that on May 30, 1979,[6] the Union filed a charge alleging that Respondent had, on April 16, violated its employees' *Weingarten* rights.[7] Respondent apparently had little concern about the charge, and further denied employees their *Weingarten* rights on two occasions on June 17 and once again on July 5. The July 5 incident, it is important to note, involved Respondent's refusal to permit a union representative to participate in an investigatory interview by directing the union representative to remain silent. On July 24, Respondent and the Union entered into an informal settlement agreement which included a nonadmission clause. The Regional Director approved the settlement on July 25. On August 13, Respondent issued a document marked "Confidential," addressed to its division heads. The document, bearing the heading "SUBJECT: NLRB SETTLEMENT AGREEMENT - HOTEL ST. FRANCIS/LOCAL 2," was an explanation to supervisors of Respondent's interpretation of the settlement agreement and its instructions to supervisors on how to handle *Weingarten* situations. The memorandum stated, in pertinent part,[8] that the settlement agreement recognized "the shop steward as a union representative *solely for the purpose of being present* during an interview between management and an employee in which the employee has reasonable fears that disciplinary action may follow . . . . The shop steward's *presence* is to assure that the employee's rights are protected . . . . The NLRB settlement agreement should not alter your day-to-day supervision of your respective employees. It is 'business as usual' and our practices with respect to 'managing the workplace' should not change because of that agreement. . . . The role of the shop steward is to observe and assist [an employee] in responding to questions, however, the shop steward may not speak for her. . . ." (Emphasis supplied.)

The Administrative Law Judge found that Respondent's memorandum violated Section 8(a)(1) of the Act, reasoning that the memorandum, read as a whole, indicated that the role of a shop steward was that of a passive observer whose *presence* was required by law, rather than an active *participant* in the interview. I agree.

In reaching a contrary result, the majority acknowledges that the memorandum is "suspect," but finds it ambiguous and, in the absence of direct evidence that the memorandum was disseminated to employees, dismisses the complaint. In my opinion, my colleagues have misplaced the respective burdens of proof of the General Counsel and Respondent. Even assuming that the reference to the role of shop stewards being "solely for the purpose of being present" and the subsequent reference to a steward's "presence," as opposed to participation,

[6] Unless otherwise noted, all dates hereinafter refer to 1979.

[7] *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975).

[8] The complete text of the memorandum is contained in the Administrative Law Judge's Decision.

amount to an ambiguity, I would find that any ambiguity in the policies expressed in the memorandum is adequately clarified by reference to Respondent's presettlement conduct and its avowed intention to continue "business as usual" despite the settlement agreement. In order to establish a *prima facie* case, the General Counsel is not required to show that the avowed policy was in fact implemented; rather, it is Respondent's burden to rebut the *prima facie* case by showing that the policy expressed therein was rescinded in a timely manner or that it was never implemented.[9] Respondent introduced no evidence to establish either fact. Accordingly, the General Counsel's *prima facie* case remains unanswered. In the absence of affirmative evidence to the contrary, we assume that company policies are followed by those to whom such policies are directed. Here, Respondent admitted that it issued the memorandum in question, and that it was distributed to those persons charged with its enforcement. Having established a *prima facie* case that the memorandum unlawfully impinged on employees' Section 7 rights, the General Counsel has proved his case. In the absence of rebuttal evidence from Respondent, the General Counsel need do nothing more.

I would thus find, in agreement with the Administrative Law Judge, that the memorandum in issue was violative of Section 8(a)(1) of the Act, and thus would set aside the settlement agreement and find that Respondent violated its employees' *Weingarten* rights as alleged in the complaint.

[9] See *Birmingham Ornamental Iron Company*, 240 NLRB 898 (1979).

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge: This case was heard before me at San Francisco, California, on October 27, 1980,[1] pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 20 on November 30, and which is based upon charges filed by Hotel and Restaurant Employees and Bartenders Union, Local 2 (20-CA-14621) (herein called the Union), and by Sin Yee Poon, an individual (20-CA-14912) on May 30 and October 10, respectively. The complaint alleges that St. Francis Hotel (herein called Respondent) has engaged in certain violations of Section 8(a)(1) of the National Labor Relations Act, as amended (herein called the Act).

On July 24, Respondent and the Union entered into a settlement agreement. On July 25, the Regional Director for Region 20 approved the settlement agreement. On November 30, the Regional Director ordered the approval of the settlement agreement be withdrawn on the grounds that Respondent failed to discharge its obligation under said agreement.

[1] All dates herein refer to 1979 unless otherwise indicated.

Issues

1. Whether the settlement agreement was properly vacated.

2. Whether Respondent violated the rights of its employees guaranteed to them pursuant to the *Weingarten* case[2] and subsequent Board cases interpreting the principles of law contained therein.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of Respondent only.[3]

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is engaged, on behalf of Western International Hotels, a corporation, in the operation of a hotel located in San Francisco, California, and providing food and lodging for guests. It further admits that during the past year, in the course and conduct of its business, that its gross volume exceeded $500,000 and that annually it purchases and receives goods and materials valued in excess of $5,000 from suppliers located outside the State of California. Accordingly, it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits and I find that Hotel and Restaurant Employees and Bartenders Union, Local 2, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

As mentioned above, Respondent and the Union entered into a settlement agreement on July 25. The Regional Director approved said agreement and, on October 18, the Regional Director sent Respondent the usual letter informing Respondent that it had satisfactorily complied with the affirmative and negative provisions of the settlement agreement and that the file in the case would remain closed "so long as the present status of compliance continues." The letter closed with the admonition, "subsequent violations may become the basis of further proceedings despite the formal closing of the

[2] *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975).

[3] At hearing, counsel for the General Counsel expressly waived her right to file a brief. However, on November 13, 1980, I received a one-paragraph letter from the General Counsel, addressed to "Honorable Stevenson," correcting certain statements which the General Counsel made at the hearing.

case." (G.C. Exh. 1-p.) Subsequent to this letter, the General Counsel received a copy of a "Memorandum to Division Heads" marked "*Confidential.*" This document, dated "8/13/79" was prepared by Respondent's general manager and bore the following heading: "SUBJECT: NLRB SETTLEMENT AGREEMENT - HOTEL ST. FRANCIS/LOCAL 2." Consisting of 1-1/4 pages of text, the document is followed by several examples of situations likely to arise and directions on how they are to be handled by Respondent's supervisors. I include below the entire text of the memo and the first example, which the General Counsel alleges violate the principles of *Weingarten* and the Act:

> On May 30, 1979, Local 2 filed an NLRB complaint (called an Unfair Labor Practice) against the hotel, alleging that the hotel had violated Section 8(a)(1) of the National Labor Relations Act by requiring employees to participate in interviews or meetings with management without union representation. A settlement agreement has been reached and the hotel will be required to post the attached notice for 60 days. As you know, the hotel has worked diligently in applying all sections of the Local 2 contract especially the section pertaining to Shop Stewards (Section 13, General Rules, page 27). Local 2, on the other hand, has sought recognition for Shop Stewards over and above what is contained in the contract, and the settlement agreement is one step toward that direction.
>
> The agreement, with respect to the shop steward recognizes the shop steward as a union representative solely for the purpose of being present during an interview between management and an employee in which the employee has reasonable fears that disciplinary action may follow after the interview has been terminated. The shop steward's presence is to assure that the employee's rights are protected under the terms of the contract and the law.
>
> The agreement also states that the recognition of the shop steward is not to supersede the rights of the parties (Hotel and Local 2) with respect to grievance handling. In other words, the shop steward may not handle grievances or raise matters that arise out of the application and interpretation of the contract. This is a very important point to keep in mind as a shop steward may very well go directly to a supervisor and attempt to represent an employee who may legitimately have a complaint which should be more appropriately handled by a Business Agent. These problem-solving matters are our responsibility as well as that of the Business Agent if one is asked to intervene. The hotel must not put itself in the position of dealing with the shop steward in problem solving. Should the shop steward persist in representing the employee, the hotel's response should be "Thank you for your interest in the matter however, it is suggested that this problem be brought to the attention of your Business Agent for resolution."
>
> The NLRB settlement agreement should not alter your day-to-day supervision of your respective employees. It is "business as usual" and our practices with respect to "managing the work place" should not change because of that agreement.
>
> Attached is a set of examples which you may use as a guide when confronted with a steward-recognition problem. Should you have any questions or difficulty in handling a problem, please call Jerry Evans and/or Lindy Valentin for assistance.
>
> cc: Department Heads
>
> 1. Mary Jane is asked to meet with her supervisor at the end of the shift to discuss the day's work. If Mary Jane feels she might be disciplined as a result of the meeting, she can request the presence of a union representative (shop steward) to be present and she must be given the opportunity to have one there. The role of the shop steward is to observe and assist Mary Jane in responding to questions, however, the shop steward may not speak for her. [G.C. Exh. 27.]

I also include below, section 13 from the collective-bargaining agreement then in effect between Respondent and the Union (July 1, 1975, through July 30, 1980).

> Shop Stewards:
>
> Shop stewards shall report to the Union violation of contract and complaints by members of the Union. Said shop stewards shall not interfere with the management of the business or substitute for the Business Agents of the Union in handling complaints. Shop stewards shall not be discharged for performance of their duties provided such activity does not interfere with his regular duties as an employee. [Resp. Exh. 1.]

At the hearing, three witnesses—two present and one former employee of Respondent—testified relating to interviews between employees and supervisors. These occurred at different times when a maid was unable to finish her assigned work. (In the jargon of the hotel business, this is called "hanging a room" or "rooms" as the case may be.) I will discuss these incidents in detail in "Analysis and Conclusions" section of this Decision.

B. *Analysis and Conclusions*

1. Respondent's memo of August 13

Respondent's initial argument is in two parts: First, it contends that its policy contained in the August 13 memo is not violative of *Weingarten*; alternatively, it argues that even if this policy is violative of *Weingarten*, there is no evidence that the policy ever restrained or interfered with any employee's Section 7 rights. I begin with Respondent's first argument which raises an important issue since an unfair labor practice will not be found based on presettlement conduct unless there has been a

failure to comply with the settlement agreement, or subsequent unfair labor practices have been committed.[4]

There can be little question that Respondent's memo of August 13 violates Section 8(a)(1) of the Act. Paragraph 2 of the memo states in part that the role of the shop steward at a disciplinary meeting is "solely for the purpose of being present" to assure the protection of the employee's rights under the contract and the law. Example 1, elaborating on the text of the memo, reads in pertinent part, ". . . the role of the shop steward [in a meeting with supervisors where discipline is possible] is to observe and assist Mary Jane in responding to questions, however, the shop steward may not speak for her." In *Texaco, Inc.*, 251 NLRB 633 (1980), the Board found a violation where the union representative's role was, in effect, that of a passive observer, rather than an active participant. Thus, the Board held that not only is the presence of a union representative required at an investigative interview when requested by the employee but, in addition, the active assistance of that representative is required during a confrontation with the employer which threatens the employee's employment security. This case is a closer case than *Texaco* and an earlier similar case entitled *Southwestern Bell Telephone Company*, 251 NLRB 612 (1980). In both of these cases, the supervisor demanded the silence of the union representative at the outset of the interview. Here the example quoted above merely says "the shop steward may not speak for her." This flat prohibition should be considered in context of the entire memo, particularly the reference on page 2 of the text:

> The NLRB settlement agreement should not alter your day-to-day supervision of your respective employees. It is "business as usual" and our practices with respect to managing the work place should not change because of that agreement.

For me to understand the expression, "business as usual," I look to the General Counsel's proof relative to the presettlement violations which I will detail below. These matters do not represent close questions and I must assume that Respondent is telling its supervisors to continue doing what they had been doing before. Accordingly, I find that Respondent's memo violated Section 8(a)(1) of the Act and therefore presented a proper foundation to vacate the settlement agreement.[5]

I do not mean to say by the above that a supervisor cannot insist on a first-hand explanation of an employee's conduct from that employee. In the same way that a supervisor cannot lawfully tell a union representative to remain silent during an investigative interview, so, too, an employee cannot tell a supervisor that the employee wishes to remain silent and allow the union representative to do all of the talking for him or her. Either of these approaches would tip the balance between the right of an employer to investigate the conduct of its employees at a personal interview, and the role of the representative present at such an interview. It is not necessary for me to state how such a balance should be struck. I say only that in this case, Respondent has fallen short and has violated the Act.

Having found that Respondent's memo violated the Act on its face, I find the second prong of Respondent's defense unavailing. It argues that there is no evidence that the policy was communicated to employees and accordingly, no violation can be based on its mere existence. This argument has several flaws. First, when offered by the General Counsel, the document was described by counsel for Respondent:

> What I'm stipulating to is that the document which counsel has referred to is a document that was issued by the Hotel St. Francis . . . .

In addition, there was no objection to its admission into evidence. Under these circumstances, and because the document is a business record, prepared in the regular and ordinary course of business, I am permitted to draw an inference that the document was used for the purpose intended.[6] Its purpose was not to communicate directly with employees, but to supervisors. Since Respondent presented no evidence to the contrary, I find that Respondent's supervisors acted in accord with the direction of the memo issued by Robert Wilhelm, general manager of the hotel. I further find, through the drawing of a reasonable inference, that Respondent's policy was communicated to employees through its supervisors' actions. Having so found, I am not certain that such a finding is essential to a violation since, as Respondent recognizes (br. p. 9, fn. 4), any act or statement of an employer must be measured by an objective standard. By that measurement, I reiterate my finding above, that Respondent's policy has violated the Act without respect to the issue of communication to employees.

2. Four alleged *Weingarten* violations

The General Counsel presented three witnesses who testified regarding their experiences with Respondent's supervisors over the issue of "hanging rooms." Charging Party Sin Yee Poon testified that on June 17, once by phone and later in person, she talked with Supervisor Pat Kelly. In accord with the hotel's standard operating procedures, Poon had informed Kelly about 2 p.m. by telephone that she would not be able to finish her assignment. When asked for an explanation, Poon requested a union representative be present. Kelly continued to demand an explanation. Finally, Kelly said that Poon should call the union business agent. However, it was Sunday and Kelly knew that the business agent would not be available. Kelly said that a union steward would not be acceptable. At 4 p.m., Poon was checking out for the day when she encountered Kelly in person. Again

[4] *Interstate Paper Supply Company, Inc.*, 251 NLRB 1423, fn. 9 (1980); *Chauffeurs, Teamsters and Helpers Local Union 215 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (B & W Construction Company, a division of Babcock & Wilcox Company)*, 251 NLRB 1234 (1980).

[5] I am not troubled by the fact that the memo was dated August 13 and the Regional Director's closing letter was dated October 18. Clearly the "Confidential" memo was not readily discoverable through investigation. Thus, the General Counsel apparently acted upon the memo as soon as it was discovered. *Chauffeurs, Teamsters and Helpers Local Union 215, supra.*

[6] Cf. *General Thermodynamics, Inc.*, 253 NLRB 180 (1980).

Kelly asked for an explanation for Poon's "hanging rooms" and again Poon asked for a union representative. Kelly ignored the request and continued the interview. On July 5, the above scenario was replayed with certain differences. This time when Poon gave telephone notice that she was "hanging room" she was told by Patty Neery, a secretary in the housekeeping department, that she could bring "anyone you wish" to represent Poon in the subsequent interview with a supervisor. About 4 p.m., Kelly asked Poon why Poon could not do the assigned work. This time Poon was represented by shop steward Feliza Magno, also a maid, and a witness at the hearing. Kelly asked Poon for an explanation and when Magno attempted to participate in the hearing, Kelly refused to permit it and directed Magno to remain silent. During this interview, Poon did give Kelly an explanation for not finishing her work, saying that she had been assigned too many rooms that day. As a result of this interview, Poon received an "Employee Warning Notice" dated July 9. (G.C. Exh. 3.)

Witness Fred Butcher, a former employee of Respondent, described a conversation he witnessed on or about April 16 in Respondent's housekeeping department. This occurred between Supervisor Diana Spicer and maid Dorothy Brownlee, neither of whom testified, and again concerned a supervisor's attempt to obtain an explanation for Brownlee's "hanging rooms." Butcher advised the maid that she had a right to the presence of a union representative. To this, Supervisor Spicer answered in Brownlee's presence, "We don't need a shop steward here." When Brownlee asked Butcher to represent her, Butch said he was not a shop steward. At this point, Spicer again said a shop steward was not needed, that all these people here are members of the Union—apparently referring to several nearby employees waiting to punch out. Spicer said that even she was a member of the Union and then continued the interview.

Respondent presented no witnesses and only one exhibit. I regard the evidence as largely undisputed. With respect to the above evidence, Respondent argues that neither Poon nor Brownlee had a reasonable fear of discipline (br. pp. 11–12). This argument must be rejected. Two employees were unable to finish their assigned work and were asked by supervisors for an explanation. One disciplinary notice did result from the four incidents related.[7] No one can seriously question the right of supervisors to conduct inquiry on unfinished work, yet the employees clearly understood that, if they did not have good reasons for not completing their work, they would be disciplined. The interviews were investigative in nature as no discipline had been decided upon prior to the interviews.[8] That three of the interviews occurred at the counter in Respondent's housekeeping department is not material and does not affect my conclusion. Similarly, I must reject Respondent's argument (br. p. 13) that at least one of the four alleged violations must fall because no "interview" occurred over the telephone. It is true that Poon testified that Kelly agreed to continue the interview later, but this was after Kelly had rejected Poon's request for a union representative and continued the interviewing no matter how briefly. Each incident is a separate violation.

In sum, I find that Respondent violated Section 8(a)(1) of the Act on four separate occasions as alleged by the General Counsel by either denying an employee's request for a union representative to be present at an investigative interview or, if the union representative were present, denying that person a meaningful and effective role in the interview.

Conclusions of Law

1. At all times material, Respondent was an employer engaged in commerce in a business affecting commerce.

2. At all times material, the Union was a labor organization within the meaning of Section 2(2), (5), (6), and (7) of the Act.

3. At all times material Kelly, Spicer, and Wilhelm were supervisors and agents of Respondent acting on its behalf; Poon and Brownlee were Respondent's employees.

4. By preparing and issuing a confidential memo of August 13, and by either denying any union representation or by denying effective union representation to Poon and Brownlee at their investigative interviews, Respondent has violated Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices affected commerce as defined in the Act.

The Remedy

Having found that Respondent violated the Act by preparing and issuing a confidential memo of August 13 and by denying Poon and Brownlee the assistance of effective union representation which they requested at their investigative interviews, I shall recommend that Respondent rescind the memo of August 13 by appropriate means and cease and desist from similar denials in the future, and expunge from its records any and all disciplinary notices issued to Poon and Brownlee as a result of the interviews found herein to be unlawful.

[Recommended Order omitted from publication.]

[7] Respondent claims Poon received the notice for leaving a "room partially completed—a subject about which [Poon] was not questioned." (Br. p. 12.) This is a distinction without a difference. The subject of the warning notice was an integral part of the Poon interview and refers to an incident which occurred on the date of interview. Its validity must rise or fall on the propriety of the interview.

[8] See *Penn-Dixie Steel Corporation, Joliet Bar Mill Division*, 253 NLRB 91 (1980); compare *Great Western Coca Cola Bottling Company, d/b/a Houston Coca Cola Bottling Company*, 251 NLRB 860 (1980).